BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NANCY SUE BUNN	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,052,298
	)	
MERCY HEALTH SYSTEM OF KANSAS, INC.	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the February 29, 2012, Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery. Kala Spigarelli, of Pittsburg, Kansas, appeared for claimant. Joseph R. Ebbert, of Kansas City, Missouri, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant's accidental injury arose out of and in the course of her employment with respondent. Accordingly, respondent was ordered to pay claimant's medical treatment with Dr. Terry Schwab and all referrals until further order.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 24, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that the evidence does not show that claimant suffered a compensable injury that arose out of and in the course of her employment. Respondent contends claimant's accidental injury was the result of the natural aging process, a normal activity of day-to-day living, and arose out of a condition that was personal to claimant.

Claimant argues that the evidence in this case, including medical evidence, proves she fractured her hip as a result of her fall at work on June 25, 2010. Further, claimant contends her unexplained fall could have occurred after she tripped on the carpet or from hitting the edge of her desk and was at the least a neutral risk.

The issue for the Board's review is: Did claimant suffer an accidental injury that arose out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant works for respondent as an administrative assistant. She was injured on June 25, 2010. She said she had gotten up to put some mail in an out box when the telephone rang. She turned around and headed back to her desk when she fell, landing on her left side and suffering a broken hip. Claimant testified she had not been having any problems with and was not experiencing any pain in her left hip before she fell. When asked what caused her to fall, she said there was a seam in the carpet, as well as the sharp edge of her desk. Claimant said it was possible that either the carpet, the desk or a combination of the two could have caused her to fall, "I really don't remember. I just remember hitting the floor."[1] Claimant believes her hip broke after the fall because she was having no pain before then.

After claimant's accident, she was taken to her personal physician, Dr. Robert Nichols. X-rays were taken, which showed her hip had been broken. She underwent surgery the next day, which was performed by Dr. Terry Schwab. She was off work until October 2010, when she went back to work part time. She gradually worked more hours and after several weeks went back to her regular job full time. She walks with a cane and has an altered gait because her left leg is now a little shorter than her right leg. She currently has pain in her low back caused by her altered gait.

Claimant testified she had no previous significant back problems. She had seen a chiropractor in 2009 a couple of times but was not a regular chiropractic patient and went mostly for problems with her neck and shoulders. Claimant also had a meniscectomy of her right knee in 2004 and had her right knee replaced in 2008. But she said her right knee had not bothered her since the 2008 surgery. She had an MRI of her left knee in November 2009 and has been diagnosed with degenerative joint disease of the left knee as well as a meniscus tear, which has not been repaired. Claimant acknowledged she had complaints of pain to her left foot in the fall of 2009. Claimant has also been diagnosed with multiple sclerosis since 1992. She has never been treated for her multiple sclerosis and said it causes her no problems and she has no limitations because of the condition. Dr. Schwab's medical record of June 26, 2010, states that claimant "does have a history of multiple sclerosis. Her multiple sclerosis causes a little bit of left sided weakness but other than that she is doing well with her multiple sclerosis."[2] Claimant denied telling either Dr. Schwab or Dr. Nichols that her multiple sclerosis caused her to have left-sided weakness.

---

[1] P.H. Trans. at 8.

[2] P.H. Trans., Resp. Ex. A at 5.

Claimant was seen on November 9, 2011, by Dr. Edward Prostic at the request of claimant's attorney. His report indicates claimant was injured when she lost her footing and fell onto her left hip. Dr. Prostic opined that claimant sustained injury in the trip and fall at work. He recommends a MRI of her lumbar spine and suggests epidural steroid injections.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

---

[3] K.S.A. 2009 Supp. 44-501(a).

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[5] *Id.* at 278.

The majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working.[6] In *Hensley*[7], the Kansas Supreme Court adopted a similar risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.

In *Bryant*,[8] the Kansas Supreme Court recently stated:

> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the [*sic*] whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement[–] bending, twisting, lifting, walking, or other body motions but looks to the overall context of what the worker was doing[–]welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[10]

ANALYSIS

The activity in which claimant was engaged when she fell, walking to her desk to answer the telephone, was an activity connected to the performance of her job. Based on the Kansas Supreme Court's analysis in *Bryant*, claimant's accident and injury arose out of the employment. It was not an activity of day-to-day living. In addition, injuries that

---

[6] 1 Larson's *Workers Compensation Law*, § 7.04[1] (2003).

[7] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979). See also *McCready v. Payless Shoesource*, 41Kan. App. 2d 79, 200 P.3d 479 (2009).

[8] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 596, 257 P.3d 255 (2011).

[9] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[10] K.S.A. 2009 Supp. 44-555c(k).

result from unexplained falls are considered to be a neutral risk and, as such, are compensable in Kansas based on the law in effect at the time of this accident.[11]

The question becomes, then, whether claimant's fall is unexplained or, instead, was the result of claimant's preexisting condition, a personal risk rather than a neutral risk. Before this accident, claimant had some degenerative joint disease in her left knee as well as a meniscus tear. Claimant admits to having had some pain in her left foot and knee in the fall of 2009, although she denies being symptomatic at the time of this accident in June 2010. In addition, she has multiple sclerosis. Claimant denies having any problems from this condition, but Dr. Schwab's records indicate claimant has some left-sided weakness. This is by history, which claimant denies giving, and does not appear to be the result of or confirmed by any objective testing performed by Dr. Schwab or by any other physician.

At this point, the cause of claimant's fall remains unknown. There is speculation that claimant's preexisting condition or conditions may have contributed to her fall, but there is no direct evidence of this. No medical expert has offered this opinion, and claimant denies it. The ALJ specifically found that claimant was a credible witness. Based upon the record presented to date, the ALJ's finding that this accident and injury is compensable as an unexplained fall and neutral risk is affirmed.

CONCLUSION

Claimant sustained personal injury by accident on June 25, 2010, that arose out of and in the course of her employment with respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated February 29, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

[11] Amendments to the Kansas Workers Compensation Act that took effect May 15, 2011, have altered this.

c: Kala Spigarelli, Attorney for Claimant
lori@spigarelli-law.com

Joseph R. Ebbert, Attorney for the Self-Insured Respondent
jebbert@fwpclaw.com
cboyer@fwpclaw.com

Brad E. Avery, Administrative Law Judge